No. 14-491

IN THE
Supreme Court of the United States

PAC ANCHOR TRANSPORTATION, INC., AND ALFREDO BARAJAS,

Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA EX REL. KAMALA D. HARRIS, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

REPLY BRIEF FOR PETITIONERS

Neil S. Lerner
COX, WOOTTON, LERNER, GRIFFIN, HANSEN & POULOS, LLC
12400 Wilshire Boulevard
Suite 1300
Los Angeles, CA 90025

Arthur Alan Severance
TRIDENT LAW, P.C.
13284 Sunshine Avenue
Whittier, CA 90605

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
Brian D. Ginsberg
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authority

REPLY ARGUMENT

The State's opposition cannot obscure the fact that the California Supreme Court's analysis conflicts with the core principles of this Court's preemption cases addressing the Federal Aviation Administration Authorization Act ("FAAAA") and the related Airline Deregulation Act ("ADA"). This Court has consistently held that whether a state enforcement action against a motor or air carrier is preempted under the FAAAA or ADA requires assessment of the enforcement action's "'real-world consequences'" with respect to carrier prices, routes, or services. *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1430 (2014) (quoting *Brown v. United Airlines, Inc.*, 720 F.3d 60, 66 (1st Cir. 2013)). The State's opposition, however, admits that the California Supreme Court did not consider a key aspect of the State's action alleging violation of certain generally applicable employment laws. Specifically, the court ignored the nature of the *mechanism*—here, the powerful Unfair Competition Law ("UCL")—chosen for enforcement in this case. This was a fundamental error that only looked at half of the relevant equation.

Court after court has held that the mere fact that the underlying obligations being enforced come from generally applicable laws does not immunize the enforcement action from preemption. A court still must look at whether the enforcement of those obligations *as the state has chosen to carry it out* will have real-world impact on price, routes, or services. The State admits that this step was not taken here and that the California Supreme Court looked only at the underlying generally applicable laws and their general application.

Accordingly, the California Supreme Court's ruling was a dramatic departure from this Court's decisions. Its approach is also contrary to that of the other lower courts that look at the full equation and examine whether the state enforcement action at issue—every aspect of it, including the state's chosen enforcement mechanism—will have a real-world effect on price, routes, or services. This Court should grant review and reverse the California Supreme Court's deviation from the established FAAAA and ADA preemption analysis, which requires taking full account of all real-world consequences. To the extent there is ambiguity regarding whether the nature of the enforcement mechanism needs to be considered in assessing the impact of the State's action, this Court should grant the writ here and make clear that it is required.

Here, the nature of the enforcement mechanism is highly relevant. The UCL is no ordinary enforcement mechanism. It can wipe a carrier out of existence. It is a sledgehammer intended to supplant the ordinary market conditions that the FAAAA and ADA were enacted to preserve and instead force a defendant to comply with the State's own view of fair competition policies. To treat such a UCL action as the equivalent of a typical employment compliance action is to compare playing with a stuffed tiger to wrestling a real one. Litigating an employment issue under the UCL is a bet-the-company proposition. As a practical matter, this vehicle forces entire industries to capitulate to the State's demands—here, that the trucking industry treat all independent-contractor drivers as "employees" unless they own their own trucks, and to make all of the infrastructural and operational changes to industry business practices necessary to accommodate

such treatment. Carrier after carrier in California has already succumbed to the State's broad-based effort to regulate the industry's business practices in exactly this way. Plainly, the nature of the precise enforcement mechanism can matter, and in this case, it does.

Thus, the California Supreme Court's flawed analysis was no harmless error. Had it followed the proper approach, it would have held the State's UCL action preempted.

Review by this Court is plainly warranted.

THE CALIFORNIA SUPREME COURT'S REFUSAL TO TAKE THE REAL-WORLD CONSEQUENCES OF THE STATE'S ENFORCEMENT MECHANISM INTO ACCOUNT CONFLICTS WITH THE FAAAA/ADA PREEMPTION ANALYSIS PRESCRIBED BY THIS COURT AND FOLLOWED BY THE OTHER LOWER COURTS.

1. The State recognizes that, under the FAAAA and ADA, any state enforcement action "'having a connection with'" motor carrier prices, routes, or services is preempted. *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 375 (2008). The State ignores, however, that this test is based on real-world consequences, not simple formalisms. *Ginsberg*, 134 S. Ct. at 1430 (explaining that "[w]hat is important" is "the effect" of a state enforcement action, *i.e.*, the "'real-world consequences'" (quoting *Brown*, 720 F.3d at 66)). This pragmatic inquiry, examining the full range of such consequences, is "deliberately expansive and conspicuous for its breadth." *Morales v. Trans World Airlines, Inc.*, 504

U.S. 374, 385 (1992) (internal quotation marks and citations omitted). Unless the consequences on motor carrier prices, routes, or services are "'too tenuous, remote, or peripheral,'" the requisite "connection" will be found and the action will be preempted. *Rowe*, 552 U.S. at 375 (quoting *Morales*, 504 U.S. at 390). Anything else would improperly countenance the "substitution of [the state's] own governmental commands for 'competitive market forces.'" *Id.* at 372 (quoting *Morales*, 504 U.S. at 370).

As detailed in the petition, the California Supreme Court deviated from these bedrock principles. As an initial matter, the state court embraced a presumption against preemption (*see* Pet. App. 8) that has no application in the context of the FAAAA/ADA.[1] *See, e.g.*, *Brown*, 720 F.3d at 68 ("[T]he presumption against preemption does not apply."); *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1325 (10th Cir. 2010) (same). Indeed, none of this Court's FAAAA/ADA decisions even hint at such a presumption. Rather, the contrary message is clear: Unless the connection to prices, routes, or services is "'too tenuous, remote, or peripheral,'" there will be preemption of the state action. *Rowe*, 552 U.S. at 375 (quoting *Morales*, 504 U.S. at 390). The California Supreme Court's fundamental

[1] Like the California Supreme Court, the Second and Sixth Circuits also erroneously apply the presumption against preemption in this context. *See, e.g.*, *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 774 (2d Cir. 1999) (applying "the starting presumption against preemption of state law"); *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493, 495 (6th Cir. 1999) (applying "the normal presumption against preemption").

error in its approach to FAAAA/ADA preemption by itself warrants this Court's review.

2. Even more clearly requiring this Court's review, the California Supreme Court refused even to consider the real-world consequences of the State's use of its UCL to enforce its generally applicable employment laws against the trucking industry. This Court has consistently rejected this type of approach to FAAAA/ADA preemption. Even state actions to enforce laws of general application are subject to preemption when they have sufficient impact on prices, routes, or services. *Morales*, 504 U.S. at 386 (rejecting as "utterly irrational" the argument that "state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute"). For example, in *Ginsberg*, this Court held that an enforcement action brought under a generally applicable theory of breach of an implied covenant of good faith and fair dealing was preempted. 134 S. Ct. at 1430; *see Mass. Delivery Ass'n v. Coakley*, 769 F.3d 11, 20 (1st Cir. 2014) (refusing the "invitation to adopt such a categorical rule exempting from preemption all generally applicable state labor laws."); *Onoh v. Northwest Airlines, Inc.*, 613 F.3d 596, 600 (5th Cir. 2010) (intentional infliction of emotional distress claim preempted as applied to manner in which airline passenger was treated by flight attendant); *Data Mfg., Inc. v. United Parcel Serv., Inc.*, 557 F.3d 849, 853 (8th Cir. 2009) (generally applicable tort claims preempted as applied to allegedly improper airline billing charges); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 610-11 (7th Cir. 2000) (generally applicable tort claims preempted

as applied to alleged improprieties in airplane purchase).

Thus, the State's (and the state court's) repeated reliance on the general applicability of the underlying employment laws is misplaced. The FAAAA/ADA preemption analysis is not answered by such formalisms. Rather, it requires a careful examination of the effects of the actual enforcement action at issue. This in turn mandates looking at the nature of the particular enforcement *mechanism* through which the state has chosen to carry out its action. *See Ginsberg*, 134 S. Ct. at 1430 (preemption calls for examination of the "'real-world consequences'" of an enforcement action (quoting *Brown*, 720 F.3d at 66)); *see also Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995) (noting different preemption consequences for actions based on substantively similar facts but prosecuted via different enforcement mechanisms).

That is not what happened in the California Supreme Court, however. Instead, as the cert. opposition candidly admits, the court's ruling focuses exclusively on "the substance of the law and allegations supporting the claim, not on the fact that the claim is pleaded under a State's unfair-competition law." Opp. 5; *see also* Opp. 7 (asserting that preemption turns solely on "the factual allegations underlying the claim"). No analysis or account is taken of what happens in the real-world when these generally applicable laws are enforced through the hammer of a UCL action.

The nature of the enforcement mechanism is, however, critical to determining a state action's actual consequences. The more Draconian the penalty for

noncompliance, the more likely a person will capitulate to the State's dictates. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169, 172-80 (1968). For example, the consequences of an administrative action regarding whether a particular independent-contractor driver hired by a carrier should be treated as an "employee" under state law are radically different—and radically less drastic—than those of a state enforcement action threatening a carrier with a corporate "death penalty" if it does not immediately do so with its entire roster. The former is not an attempt to regulate the trucking business writ large, but the latter is.

The California Supreme Court should have examined where the State's UCL action fell within that continuum. Instead, it erroneously treated the nature and means of enforcement as irrelevant. That ruling cannot be squared with this Court's decisions, nor with the overwhelming weight of circuit precedent dutifully following them and requiring courts to account for the full real-world impact of a state enforcement action.[2]

---

[2] Contrary to the State's suggestion (Opp. 5-7, 12), the fact that *sometimes* an examination of the enforcement mechanism will not alter the ultimate conclusion (*e.g.*, *Dan's City Used Cars v. Pelkey*, 133 S. Ct. 1769 (2013)) does not render it irrelevant across the board. This is simply flawed inferential reasoning. For example, citing two instances where a presidential candidate lost the Commonwealth of Virginia yet still won the election does not mean in all elections the outcome in the Commonwealth will be irrelevant. So too here, pointing to two or three instances where the ultimate results were not swayed by the enforcement mechanism hardly renders the nature of the mechanism categorically irrelevant.

The California Supreme Court's deviation from the FAAAA/ADA preemption analysis required by this Court's precedents—a full accounting of all real-world consequences—warrants this Court's review. To the extent there is ambiguity regarding whether the nature of the enforcement mechanism needs to be taken into account, however, that ambiguity would likewise fully support this Court's review to make crystal clear that the impact on price, routes, and services needs to account for the real-world consequences of the enforcement mechanism employed by the State.

3. The First Circuit's recent decision in *Massachusetts Delivery Association*, discussed in the State's opposition (Opp. 13), only highlights the need to review the California Supreme Court's fundamental error. The First Circuit required the district court in that case to do exactly what the California Supreme Court refused to do here: examine the real-world consequences of state actions seeking to require carriers to re-classify their independent-contractor drivers as "employees" for purposes of relevant state employment laws.

Massachusetts Delivery Association involved a motor carrier with a roster of 58 independent-contractor couriers. 769 F.3d at 14. It sought a declaratory judgment that the FAAAA preempted a generally applicable Massachusetts statute that "required [it] to designate [its] couriers as employees." *Id.* at 14-15. It observed that "[a]n 'employee' classification under [the statute] triggers legal requirements on the 'employers' under various wage and employment laws." *Id.* at 15. And the carrier argued that, as a result, "the reclassification of its 58 independent couriers as employ-

ees would change the routes offered to customers, would preclude [certain] delivery services, and would drastically increase [its] costs and thus its prices." *Id.* at 21.

The district court found the Massachusetts law not preempted, largely because it was a law of general applicability. The First Circuit reversed. Taking an approach contrary to the California Supreme Court here, the First Circuit held that the worker-classification statute "potentially impacts the services the delivery company provides, the prices charged for the delivery of property, and the routes taken during this delivery." *Id.* at 23. It ordered the district court to "address on remand whether this effect on delivery companies' prices, routes, and services rises to the requisite level for FAAAA preemption." *Id.* The First Circuit also "rejected the contention that empirical evidence is necessary to warrant FAAAA preemption." *Id.* at 21. It would suffice to look to the law's "'logical effect.'" *Id.* (quoting *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 82 n.14 (1st Cir. 2006), *aff'd* 552 U.S. 364); *see also Ginsberg*, 132 S. Ct. at 1427 (finding preemption at the motion-to-dismiss stage).

4. It is just that type of real-world consequences and logical effect that the California Supreme Court refused to even take into account here. That the State took special care to bring this case via the UCL, rather than through the underlying provisions themselves, makes all the difference.

Consider what Petitioners have to do in order to appease the State. They must overhaul their business model in one of two ways. They could conform their

back-office infrastructure, field operations, compensation practices, and other functions to those required for carriers using "employee" drivers (as the State contends they are). Or, they could replace their 75 independent-contractor drivers with those who own their own trucks and retain the right to service other carriers (which the State suggests would be required in order for carriers to continue to call them "independent contractors"). Either method of capitulation substantially affects Petitioners' prices, routes, and services. *See* Pet. 24-27. But Petitioners are far from the only carriers in the State's crosshairs. The State has already coerced such submission from other carriers. Pet. 6 n.2; Opp. 10 n.1. This is all part of the State's targeted effort to regulate the manner in which California motor carriers conduct their business and deliver their services.

It is no accident that the State is seeking to achieve such broad-scale regulation of motor carriers through the UCL. The UCL is *California's Unfair Competition Law*. The State uses *it*—rather than ordinary lawsuits—when it wants not only to make victims whole but to force businesses to deviate from naturally occurring market conditions and conform instead to *the State's concept* of "fair competition in commercial markets for goods and services." *Kasky v. Nike, Inc.*, 45 P.3d 243, 249 (Cal. 2003); *see Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1091 (Cal. 1998) ("[I]t is in enacting the UCL itself, and not by virtue of particular predicate statutes, that the Legislature has conferred … 'specific power' to prosecute unfair competition claims." (quoting *California v. McKale*, 602 P.2d 731, 735 (Cal. 1979))). As the California Law Revision Commission put it, the UCL

power enables the State to "shap[e] the marketplace by restraining [certain] business practices." *Unfair Competition Litigation*, 26 Cal. L. Revision Comm'n Reports 191, 202 (1996). As the California Supreme Court itself has recognized, "the UCL does not serve as a mere enforcement mechanism." *Rose v. Bank of Am., NA*, 304 P.3d 181, 185 (Cal. 2013).

The UCL enables the State to shape markets and displace ordinary competitive forces by arming it with powerful coercive measures that ordinary statutes do not provide. This includes hefty civil penalties. Using the UCL, the State can threaten defendants with up-to-$2,500-per-violation civil penalties. Cal. Bus. & Prof'l Code § 17206(a). Indeed, if it proceeds via the UCL as opposed to a predicate provision, it "shall" do so. *Id.* § 17206(a), (b). When multiplied over numerous employees and hundreds of claimed violations as to each, the UCL action could spell the death knell for the target if the target does not capitulate to the State's demands. *See Rowe*, 552 U.S. at 369 (finding preemption and noting that the state's chosen enforcement mechanism provided for penalties of up to $1,500 per violation).

Thus, the UCL hangs as a Sword of Damocles over the heads of small businesses and compels them to agree to the State's terms rather than gamble the company's future. This coercive UCL power has led the *Wall Street Journal* editorial page to dub California the "shakedown state." Walter Olson, *The Shakedown State*, Wall St. J., July 22, 2003, at A-12. And the UCL's formidable power has been on full display in the type of worker-classification actions like the State's here. As noted above (*supra* p. 10), the State has used

UCL actions to extract stipulated judgments and permanent injunctions from five other similarly situated motor carriers sued at the same time as Petitioners.

The California Supreme Court deviated from this Court's teachings (as well as the holdings of other lower courts) by failing even to examine the full measure of these consequences in the first place. Had it done so, it would have found that the real-world logical consequences of the State's UCL enforcement action have ample connection with motor carrier prices, routes, and services.

Thus, the California Supreme Court's analysis conflicts with the core principles of this Court's FAAAA/ADA preemption cases, cannot be squared with rulings of the courts of appeals, and is simply wrong. The matter plainly warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Neil S. Lerner
COX, WOOTTON, LERNER, GRIFFIN, HANSEN & POULOS, LLC
12400 Wilshire Boulevard
Suite 1300
Los Angeles, CA 90025

Arthur Alan Severance
TRIDENT LAW, P.C.
13284 Sunshine Avenue
Whittier, CA 90605

E. Joshua Rosenkranz
Counsel of Record
Robert M. Loeb
Brian D. Ginsberg
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

February 4, 2015